

July 20, 2012

The Honorable Ron Wyden
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Senator Wyden:

Thank you for providing us the opportunity to perform a classification review of the following three statements you would like to make about collection activities undertaken under the authority of the Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008 (FAA):

- A recent unclassified report noted that the Foreign Intelligence Surveillance Court has repeatedly held that collection carried out pursuant to the FISA Section 702 minimization procedures used by the government is reasonable under the Fourth Amendment.
- It is also true that on at least one occasion the Foreign Intelligence Surveillance Court held that some collection carried out pursuant to the Section 702 minimization procedures used by the government was unreasonable under the Fourth Amendment.
- I believe that the government's implementation of Section 702 of FISA has sometimes circumvented the spirit of the law, and on at least one occasion the FISA Court has reached this same conclusion.

We continue to appreciate your interest in an informed public debate on the government's use of its intelligence collection authorities. We share your view that it is important that there be maximum transparency in government, but that it is necessary to protect certain critical intelligence activities—including the government's acquisition of critical foreign intelligence information through the use of FAA authorities—from public disclosure to safeguard sensitive sources and methods. As we have discussed before, striking this balance is never easy. It can be further complicated through the public release of fragments of unclassified information that create an incomplete and misleading understanding of the facts. As you are aware, Congress attempted to strike the necessary balance by providing for strict and robust Congressional and judicial oversight of the government's use of FAA authorities, to include multiple reporting, auditing, and review requirements. But we agree that public disclosure, where it can be accomplished without jeopardizing sensitive sources and methods, is the best way to serve the public interest.

The text that you have asked us to review concerns classified opinions of the Foreign Intelligence Surveillance Court (FISC). FISC opinions are derivatively classified because of the sensitive intelligence matters they concern. However, pursuant to Section 3.1 of Executive Order 13526, the Director of National Intelligence (DNI), has determined, as an exercise of his

discretion, “that the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure.” Accordingly, the DNI has taken the exceptional step of declassifying your proposed text and the other information contained in this letter.

The DNI has decided to take this action, in consultation with the affected elements of the Intelligence Community and the Department of Justice, based on his determination that the need to protect the information contained in these statements is outweighed by the public interest in disclosing this information. The DNI reached this determination based on a combination of specific considerations, including that the text to be declassified does not identify any intelligence sources and methods. Given that conclusion, and since the information to be declassified is narrowly confined to addressing the government’s use of Section 702 in the context of the ongoing public debate about FAA reauthorization, the DNI has determined that declassification of this text is in the public interest. Different classification questions would have been raised if, for example, the proposed statements more specifically addressed particular matters or had been joined with other statements providing additional context from which classified information could be inferred, the release of which might harm national security.

Please be advised that this declassification decision applies only to the precise three statements that you submitted for review and the other information in this letter. No additional comment or background information related to any underlying FISC opinions has been declassified for public disclosure and this declassification decision does not apply to any other information.

Because the three statements you asked us to review are fragmentary and incomplete, we believe they may convey an incomplete and potentially misleading understanding of what has transpired. Accordingly, we request that when you make these statements, you also include the following point:

- The government has remedied these concerns and the FISC has continued to approve the collection as consistent with the statute and reasonable under the Fourth Amendment.

Indeed, as your first bullet on page one notes, the FISC has repeatedly held that collection carried out under Section 702 is reasonable under the Fourth Amendment. In addition, we hope you will point out that both the FISC and the Intelligence and Judiciary committees of the House and Senate are kept fully informed of the government’s use of Section 702. The committees are provided detailed briefings and are provided with FISC opinions and pleadings as required by the statute.

We believe Section 702 of the FAA is a well-calibrated statute that strikes an appropriate balance between protecting national security and safeguarding privacy and civil liberties. All three branches of government are involved in ensuring that the appropriate balance is struck. First, the FISC, which consists of federal judges appointed by the President and confirmed by the Senate, must find that the government’s procedures are consistent with the statute and Fourth Amendment. Second, Congress oversees the use of these authorities and receives extensive briefings and reports, and access to classified FISC opinions and related pleadings. Finally, the Executive Branch carries out extensive oversight of the use of FAA authorities, which includes

regular on-site reviews of how FAA authorities are being implemented, documented in reports produced to Congress that describe any incidents of non-compliance and remedial measures taken. At no time have these reviews found any intentional violations of law.

We hope this information is helpful.

Sincerely,

A handwritten signature in black ink that reads "Kathleen Turner". The signature is written in a cursive, flowing style.

Kathleen Turner
Director of Legislative Affairs

cc: The Honorable Dianne Feinstein
The Honorable Saxby Chambliss